No. 3678

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BASICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon

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INDEX OF AUTHORITIES CITED

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STATEMENT.

The first count of the indictment on which plaintiff in error, (hereinafter referred to as the defendant) was tried charges him on August 4, 1920, with maintaining a common nuisance within the intent and meaning of the National Prohibition Act by keeping and maintaining a building in the vicinity of Newberg, Oregon, wherein intoxicating liquor was manufactured and kept. The second count of the indictment charges him with manufacturing intoxicating liquor at the same place on the same date, and the third court charges him with having transported intoxicating liquor from the building referred to by means of a Republic automobile truck on August 1, 1920. (Transcript, pages 4, 5 and 6.)

The trial jury returned a verdict of guilty on the first two counts of the indictment and a verdict of not guilty on the third count. (Transcript, page 9.)

On the first count, the defendant was sentenced to be imprisoned in the County Jail of Multnomah County for a term of one year, and, on the second count, he was sentenced to be imprisoned in the same

jail for a period of six months, the two sentences, however, to run concurrently. (Transcript, pages 11 and 12.)

On August 4, 1920, acting under authority of a Government search warrant, Federal Prohibition Agents searched a building on the W. L. Hall ranch in the vicinity of Newberg, Yamhill County, Oregon, and found therein a large distilling apparatus set up and in operation, together with some eight hundred gallons of corn meal mash, about one hundred and fifty gallons of corn moonshine whisky, and, approximately, one thousand pint bottles of uniform shape. (Transcript, pages 29 and 30.)

From the Bill of Exceptions it appears that the principal witness for the Government was one Bob Ugan, who testified that he was employed by the defendant to operate the still and to manufacture the corn moonshine whisky. For his services, Ugan testified, the defendant was to pay him $300 per month and his expenses. The defendant furnished all materials used in the manufacture of the whisky and assisted Ugan at various times in his work. The still was operated from about the middle of May, 1920, until the time of the raid, during which period

some four or five hundred gallons of whisky were distilled. All of this whisky was bottled in pint bottles, similar to those found by the Prohibition Agents, and was removed from the premises by the defendant. (Transcript, pages 30 and 31.)

Ugan's testimony was corroborated by four witnesses who testified to having seen the defendant go to the building in question on numerous occasions during the spring and summer of 1920. One witness, Delmar Hall, testified to having seen the defendant bring to the building in question materials used in its construction and, on another occasion, to deliver to the building filled grain sacks. (Transcript, page 30.)

To further corroborate the testimony of the witness Ugan, the Government proved that on June 28, 1920, the defendant had in his possession at the Oak Hotel in the City of Portland, 24 pints of moonshine whisky, two bottles of which were introduced in evidence and marked Government's Exhibits E and F. (Transcript, pages 19, 24 and 26.) Expert testimony was then offered by the Government to prove that the bottles found in the possession of the defendant on June 28, 1921, contained corn moon-

shine whisky made by the same process, of the same ingredients and bottled in the same kind of flasks as was the liquor found at the still on August 4, 1920. (Transcript, pages 25, 26, 27 and 28.) The bottles found at the still and offered in evidence and marked Government's Exhibits A. B. and C. are of peculiar shape, being round on one side with beveled corners on the other and are of the same size and shape as the bottles found in defendant's possession at the Oak Hotel on June 28, 1921. (See Government's Exhibits A. B. C. E. and F.)

The defendant urges as his principal ground for reversal, the alleged error of the Trial Court in admitting in evidence proof that the defendant had the 24 pints of whisky in his possession on June 28th, 1921.

ARGUMENT.

The sole question presented by defendant's brief is whether or not the Trial Court erred in the admission of certain testimony introduced by the Government to the effect that on June 28, 1920, the defendant had in his possession at Portland, Oregon, 24 pints of moonshine whisky.

Other assigned errors are not mentioned in the argument and, for that reason, we assume, they have been abandoned.

Home Benefit Association vs. Sargent, 142 U. S. 691-694.

Loomis, Collector of Internal Revenue, vs. Wattles, 266 Federal, 876-878.

Ireton vs. Pennsylvania Company, 185 Federal, 84-86.

We concede that, as a general rule, evidence tending to show the commission by the accused of a separate and distinct crime is inadmissible for the purpose of aiding in the proof that he is guilty of the crime charged. This general rule, however, does not apply to cases where the evidence of another crime tends directly to prove defendant guilty of the crime charged. Evidence which is relevant to defendant's guilt is not rendered inadmissible because it proves or tends to prove him guilty of another and distinct crime.

Williamson vs. United States, 207 U. S. 425-451, 28 Sup. Ct. 163-172.

Moore vs. United States, 150 U. S. 57-61.
Luders vs. United States, 210 Fed. 419-423.
Jones vs. U. S. 179 Fed. 584-604.
Wolfson vs. U. S. 101 Fed. 430-434.

The evidence of which the defendant complains was offered by the Government on the theory that it tended to connect the defendant with the crimes for which he was being tried. The fact that it also tended to show the commission of a separate and distinct crime by the defendant was merely incidental.

The bottles which were found in the defendant's possession on June 28, 1920, were similar in shape and size to the bottles which were found at the still which defendant was charged by the indictment with maintaining. The liquor contained in these bottles, according to expert testimony of the witness Beeman, was made by the same process and of the same ingredients as that found at the still by the Prohibition Agents. (Transcript, page 27. See also Government's Exhibits A, B and C, being bottles found at the still by Prohibition Agents and Government's Exhibits E and F, being bottles found in defendant's possession on June 28th.)

It also appeared from the testimony of the witness Ugan, that defendant had operated the still, which was the subject of the indictment, from about May 15, 1920, until August 4, 1920, during which time he had taken liquor from the place once or twice a week in bottles similar to those introduced in evidence and in quantities ranging from five to ten gallons at a time. (Transcript, pages 30 and 31.)

It would seem certain, therefore, the evidence complained of was clearly material and relevant to the issues presented by the indictment on which the defendant was being tried. It tended to corroborate the testimony of the witness Ugan to the effect that the defendant between the middle of May, 1920, and the 4th of August, 1920, was removing from the premises in question intoxicating liquor manufactured there and exercising a proprietorship over the premises. It was also circumstanial evidence tending to connect the defendant with the still in question due to the fact that the bottles were of the same shape and size as those found at the still and not the ordinary bottle commonly used as a container for whisky, and due, also, to the fact that the whisky found in his possession on June 28th was made of the same

ingredients and by the same process as that found at the still.

The extent to which this evidence might be considered by the Trial Jury was carefully limited by the Trial Judge in his instructions. The jury was instructed on this point as follows:

> "Now, there was testimony introduced in this case that in June of 1920 the defendant was apprehended with a suitcase containing liquor. He is not on trial for that offense. That evidence is to be considered by you only as bearing upon the issues tendered by the indictment in this case. It was admitted for no other purpose and is not to be considered by the jury for any other purpose. That is, unless you believe, beyond a reasonable doubt, that the defendant kept and maintained a nuisance, as I have defined that term to you, or that he manufactured intoxicating liquor, or that he transported intoxicating liquor, as stated in the indictment, you would not be justified in finding him guilty simply because you believed that he was in possession of intoxicating liquors at the time of his apprehension." (Transcript, page 32.)

In the case of Williamson vs. United States, 207 U. S. 425-451, 28 Sup. Ct. 163-172, Mr. Justice White,

speaking for the Supreme Court of the United States, disposed of a similar objection in the following language:

> "The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as a trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof."

In the case of Moore vs. U. S., 150 U. S. 57, 14 Sup. Ct. 26, the defendant was indicted for the murder of Charles Palmer. The government relied mainly on circumstantial evidence. Some of this evidence tended to show that the defendant was also guilty of the murder of a man named Camp. Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the Court in that case, said (150 U. S. 61, 14 Sup. Ct. 28):

> "The fact that the testimony also had a tendency to show that defendant had been guilty of

> Camp's murder would not be sufficient to exclude it, if it were otherwise competent."

The only direct evidence available to the Government of the defendant's guilt was the testimony of the witness Ugan, an accomplice. Certainly it was the duty of the Government to corroborate, insofar as possible, his testimony by circumstantial evidence. Great latitude is allowed in the reception of circumstantial evidence and even though its value be very slight, it is nevertheless competent. As was said in the case of Holmes vs. Goldsmith, 147 U. S. 150-164:

> "The competency of a collateral fact to be used as a basis for legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded on truth."

The fact that the liquor found in the defendant's possession on June 28th was made by the same process, of the same ingredients and bottled in the same flasks as was the liquor found at the still on August 4th, might not be conclusive of the fact that

the liquor found in his possession on June 28th came from the still in question, but, when taken with the testimony of Ugan, to the effect that between May 15th and August 4th, the defendant was taking liquor from this still as often as once or twice a week and when coupled with the testimony of other witnesses to the effect that defendant was seen going to and from the building in question, on numerous occasions during the spring and summer of 1920, we believe that the jury might very well infer therefrom that part, at least, of the testimony of the accomplice was true.

This Court in the case of Luders vs. United States, 210 Fed. 419-423, had occasion to pass upon the same kind of an objection as is raised by the defendant in this case. In the Luders case this Court said:

> "Assuming that the testimony did tend to prove the commission of another offense, its admission was not rendered improper if it was relative to the offense charged in the indictment."

The same question was decided by this Court in the case of Jones vs. United States, 179 Fed. 584-604,

wherein the Court quotes from the case of State vs. Adams, 20 Kan. 311-319, as follows:

> "Whatever testimony tends directly to show the defendant guilty of the crime charged is competent; though it also tends to show him guilty of another and distinct offense. The party cannot by multiplying crimes diminish the value of competent testimony."

To the same effect is the case of Wolfson vs. United States, 101 Fed. 430-434. The Court in that case stated the law as follows:

> "When a defendant is on trial for one offense, irrelevant testimony of the commission of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it."

The books are full of cases to the same effect and we have been unable to find a single case holding that evidence otherwise material and relevant to the issue

was inadmissible merely because it proved or tended to prove the commission of a separate and distinct crime by the defendant. We urge that the evidence objected to in this case was relevant to the issues presented by the indictment. It was offered by the Government for the purpose assigned only and not for the purpose of proving the commission by the defendant of a separate and distinct crime. Its application was carefully limited by the Trial Court in the instructions to the jury and we respectfully submit that no error was committed nor was any substantial right of the defendant infringed upon by the admission of the testimony in question.

Respectfully submitted,

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